In the Supreme Court of the United States.

OCTOBER TERM, 1912.

WARREN B. WHEELER, PLAINTIFF IN error, *v.* THE UNITED STATES.	No. 658.
STILLMAN SHAW, PLAINTIFF IN ERROR, *v.* THE UNITED STATES.	No. 659.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

WARREN B. WHEELER, APPELLANT, *v.* GUY MURCHIE, UNITED STATES Marshal, etc.	No. 660.
STILLMAN SHAW, APPPELLANT, *v.* GUY MURCHIE, UNITED STATES Marshal, etc.	No. 661.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

SUPPLEMENTAL AND REPLY BRIEF FOR THE UNITED STATES AND THE UNITED STATES MARSHAL.

I.

THE ALLEGED DEFECT IN THE FORM OF THE SUBPŒNA, NOT HAVING BEEN RAISED BELOW, IS NOT OPEN TO QUESTION HERE.

The sufficiency of the subpœna, because addressed to the corporation, which had been dissolved, and

not to Wheeler and Shaw individually, was not questioned in the proceedings below. The defense in each case, as appears from the respective findings of fact made by the court, and the bill of exceptions therein (R., No. 658, 659, pp. 10–12; No. 660, 661, pp. 5–11), shows that the sole defense made to the production of the books was the privilege of the defendants under the Fourth and Fifth Amendments to the Federal Constitution and the Massachusetts Bill of Rights.

That no point of the kind now urged was sought to be made below also appears from the following statement of Warren B. Wheeler to the grand jury (R., No. 659, p. 6; No. 660, p. 9):

> Third. Whether addressed to said corporation or to me personally, I am advised that said subpœna violates the rights secured to me by the fifth amendment to the Constitution of the United States not to be a witness against myself in any criminal case.

In his motion to dismiss the petition for attachment for contempt (R., No. 659, pp. 6–7) Wheeler made no claim that the subpœna was defective because addressed to the corporation. In short, the record shows that the defendants were in court and refused to produce the books and papers called for by the subpœna simply on the ground of privilege.

Moreover, even if the subpœna were defective in form, that would not go to the power of the court to commit or remand the appellants. In *Hale* v.

Henkel (201 U. S., 43, 76), where this court held that the subpœna was "far too sweeping in its tenor to be regarded as reasonable," it was held (p. 77) that "this objection to the subpœna does not go to the validity of the order remanding the petitioner, which is, therefore, affirmed." To the same effect is *Ex parte Hedden* (90 Pac. Rep. 737, 742, 743).

The objection made in Wheeler's statement to the grand jury that the subpœna was too broad in its scope is disposed of by *Wilson* v. *United States* (221 U. S., 361, 376), as the subpœna here follows the form there sustained. This objection was apparently abandoned below and is not pressed here. Moreover, as above stated, *Hale* v. *Henkel*, *supra*, holds that a defect of this kind does not go to the validity of the court's order.

II.

AS TO THE CLAIM OF PRIVILEGE UNDER THE FOURTH AND FIFTH AMENDMENTS.

1. The Fifth Amendment has no application because appellants were not called as witnesses.

The immunity granted by the Fifth Amendment that no person "shall be compelled in any criminal case to be a *witness* against himself," means *testimonial* compulsion. (Wigmore on Evidence, vol. 3, sec. 2263.)

Appellants were merely called upon to produce the books of the corporation; not to testify as to any facts concerning them, the subpœna containing no *ad testificandum* clause. The mere production of the books would not make them witnesses.

A subpœna *duces tecum* without the *ad testificandum* clause was sustained in the *Wilson* case (221 U. S., 372), where it was held that it was not necesaary "to have the person producing the documents sworn as a witness."

It will be observed that in *Boyd* v. *United States* (116 U. S., 616) the order to produce the papers was held to be a violation of the provision of the Fourth Amendment against unreasonable searches and seizures. If the majority of the court had thought the Fifth Amendment applicable, it would have been unnecessary for them to consider the application of the Fourth Amendment.

A person who merely produces books and papers does not vouch for their contents, and when, as here, they are the records of a corporation and tell its story, not his, he is not even in effect made a witness against himself by being compelled to produce them.

2. The order to produce the books of the corporation was not an invasion of appellants' privacy within the meaning of the Fourth Amendment.

A corporation being the creature of the State, its acts are necessarily subject to the supervision of government. An individual can not defeat the exercise of this governmental power by merely acquiring title to the corporate books and papers. The transfer of title does not change the character of such documents as the records of the corporation.

The Fourth Amendment, as construed in *Boyd* v. *United States* (116 U. S., 616), merely protects a person against an invasion of his *privacy*, when such in-

vasion will operate to incriminate him. But it is no invasion of a man's *privacy* to compel him to produce the books and papers of a corporation, whose acts, as above stated, are necessarily subject to investigation by the State. So, in the *Wilson* case, referring to the books and papers of the corporation there concerned, the court said (221 U. S., 374):

> * * * It may yet appear that they are of a character which subjects them to the scrutiny demanded and that the custodian has voluntarily assumed a duty which overrides his claim of privilege. This was clearly implied in the *Boyd case*, where the fact that the papers involved were the *private* papers of the claimant was constantly emphasized.

The contention that it will be an unconstitutional invasion of the *privacy* of an officer or former officer of a corporation for the State to compel him to produce the books of the corporation is manifestly absurd.

The case at bar is sought to be distinguished from the *Wilson* case on the ground that the corporation has been dissolved and the legal title to its books and papers is in the defendants. But if the *character* of the books and papers is the determinative factor, as the *Wilson* case plainly holds, these differences are immaterial. While the corporation may be dissolved, its records are still subject to examination for any purpose connected with the winding up of its affairs (Laws of Massachusetts, 1903, chap. 437, sec. 52). Moreover, the act of March 25, 1912 (Acts, Mass., 1912, chap. 313, p. 210, 232), which

dissolved Wheeler & Shaw (Inc.), along with about five hundred other corporations, provided (sec. 2) that—

> nothing in this act shall be construed to affect any suit now pending by or against any corporation mentioned in the first section hereof, nor any suit now pending or hereafter brought for any liability now existing against the stockholders or officers of any such corporation.

The court below was asked by appellants to take judicial notice of these State statutes. (Rec., Nos. 658, 659, p. 7.)

Whether the liability mentioned in the Massachusetts act of 1912 includes criminal liability is immaterial. Clearly, the State reserved the right to inquire into the acts of the corporation for the purpose of determining whether it or its officers or agents had violated its criminal laws and clearly, also, under the decision in the *Wilson* case, the United States had like authority with respect to the enforcement of its own laws.

The possession of legal title to the corporate books and papers by Wheeler and Shaw does not affect the *character* of those documents. They are none the less the records of the corporation because the legal title thereto has passed to Wheeler and Shaw as individuals.

It is true that in the *Wilson* case the officer was attempting to withhold the corporate records against the wishes of the corporate officers. But the decision rests principally upon the character of the books as cor-

porate records, the fact that the possession of Wilson was wrongful being merely an added reason why he should not be allowed to withhold them.

Judge Hand, holding the District Court for the Southern District of New York, so interpreted the *Wilson* case in *In re Grant* (198 Fed. 708), in which case also the possession of the party subpœnaed to produce the corporate books was lawful. He said:

> In Wilson *v.* United States (221 U. S., 361, 31 Sup. Ct., 538, 55 L. Ed., 771), Wilson originally had custody of the corporate records as president; but before the second presentment of the grand jury the directors had demanded them of him, and he had refused to deliver them. Therefore the first subpœna went before the demand, the second after, but the court did not distinguish. Now with the first I have here no concern, because, while Wilson did not maintain any possession against the corporation, his custody was the corporation's, and the only question was whether he could protect himself from self-incrimination through that fact. That too was *Dreier's* case (221 U. S., 394; 31 Sup. Ct., 550; 55 L. Ed., 784), which was decided at the same time as Wilson's. However, after Wilson assumed personal possession of the books, a different question arose. The court might have said that his possession would be respected as privileged, whether as against the corporation it was lawful or not, and that, until the corporation had got back the books from Wilson's wrongful possession, no writ should go. That would have been

to deny the privilege to the corporation only, but to allow it to the individual no matter what was the original character of the books. Of course, such a result would have been most undesirable in practice, and yet I think that it would necessarily be the result if the papers had not been public in character. For instance, suppose that A, knowing that B has papers which would incriminate him, gets wrongful possession of them from B, whom they do not incriminate. If B is content, and leaves A in possession, I do not understand that it would be any answer whatever to A to say: "You can not keep these back, because you came by them wrongfully, or at least you have no right to them now." All the law considers is whether A has got possession in fact, and whether the documents actually will tend to incriminate him. To get them in evidence the law would have to force him to bring them out of a possession which is good enough against any one but B. Certainly I can find nothing in the books which suggests such a distinction, and it contradicts the whole history of the matter. For the privilege runs along side by side with the power to compel production, and that power depends only upon serving the actual possessor. There are cases to be sure where one having custody is not required to produce, but it is only because his custody is so subordinate as not to justify his meddling with documents even to bring them to court. Certainly, a full possessor of the documents is always subject to subpœna, whether his possession is lawful or unlawful, and regardless of ownership.

> Now the Supreme Court paid no attention whatever to this distinction, *for they put the decision upon the quasi public character of the record when it was originally made*, which, as I read it, subjected it as a document to production in anyone's hands, whether it hurt him or not to discover it. That certainly is the burden of Mr. Justice Hughes' opinion, and, for the reasons I have given, I think it is the logic of the decision. If so, the question of legal title does not matter; indeed, this case shows how little it should. For the respondent concedes that Burlingame would have had to produce these books during the years 1908 and 1909, merely because he had no legal title, though he owned all the stock; but he insists that the passage of title makes the whole difference. Surely that is very dry straw.

This case is now before this court (*Walter B. Grant and E. E. Burlingame, appellants,* v. *United States,* No. 831) having been recently placed on the summary docket and advanced for hearing on January 6, 1913.

Legal title is immaterial upon a subpoena to produce books or papers, because the court is entitled to them as against anyone for the time being, and the proceeding is not one to try title. The person subpoenaed can not refuse to produce the papers sought if he has not title, and if he has title as well as possession, he is no better able to respond.

The question whether the production of books and papers may be compelled, therefore, necessarily goes back to the *character* of the documents sought.

3. The rule, both at law and in equity, that a person can not be compelled to produce books and papers to discover matters which may incriminate him, is subject to the qualification here contended for.

Section 724 of the Revised Statutes provides that—

> In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power which contain evidence pertinent to the issue, *in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery.*

It is well settled that the rule in equity that "no man need discover matters tending to criminate himself, or to expose him to a penalty or forfeiture," is subject to an exception in respect to frauds and also where fiduciary relations exist. (Adams' Equity, 8th ed., p. 4.)

In *State* v. *Maury* (2 Del. Ch. Rep., 141, 158) it was held that a court of equity had jurisdiction to compel the managers of a State lottery to make an accounting, although the matters disclosed might incriminate them, the court following *Green* v. *Weaver* (1 Sim. Rep., 404; 2 Eng. Ch. Rep.), to the effect that persons occupying places of trust and confidence must be ready at all times to render an accounting.

Under the principle just stated, an executor or trustee could be compelled to produce his books of account, regardless of the fact that the title thereto might be in him. The books may belong to the

trustee, but the story which they contain is one that the State is entitled to know.

So, with respect to the books and papers of a corporation. A corporation and its officers may fairly be said to occupy a relation of trust and confidence to the State which created them, and therefore, by analogy to the principle of equity just stated, a State is entitled to a discovery of their acts in order to know whether they have kept faith with it or have violated its laws.

It may also be said to be a fraud upon the State for an officer of a corporation to attempt to defeat its right to investigate the acts of its creature by having the books and papers of the corporation transferred to him.

4. Sound public policy forbids the extension of the privilege against self-incrimination to a case involving the production of corporate records.

Wigmore thinks the privilege should be maintained, but that it "should be kept within limits the strictest possible." (Vol. 3, sec. 2251, p. 3102.)

The privilege is for the protection of the innocent. Will any such purpose be subserved by extending it to the defendants in this case? What invasion of their *privacy* will they sustain by having the records of the corporation examined by the Government?

Wheeler and Shaw say the corporation is dissolved—dead. What do they fear, then—a voice from the grave? And if that voice is permitted to speak, who would testify? Wheeler and Shaw, or the corporation?

The corporation may be dissolved, but its acts survive, and no veil should be permitted to be thrown around them. If it has violated the laws of the land, may that not be inquired into? By what right or justice can persons be permitted to commit crime through the agency of a corporation, and then, by having it dissolved and obtaining possession of its books, obstruct an inquiry into their acts? If such a privilege were maintained, would it not indeed be "justice *tampered* with mercy?"

Both on reason and authority, therefore, the claim of privilege under the Fourth and Fifth Amendments, as asserted in these cases, should be denied, and the judgments of the lower court affirmed.

WILLIAM R. HARR,
Assistant Attorney General.

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Nos. 658, 659, 660, 661

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APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR WHEELER AND SHAW, PLAINTIFFS IN ERROR AND APPELLANTS, ON THE MOTION OF THE UNITED STATES TO AFFIRM

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APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR WHEELER AND SHAW, PLAINTIFFS IN ERROR AND APPELLANTS, ON THE MOTION OF THE UNITED STATES TO AFFIRM.

STATEMENT OF THE CASES.

This is a motion to affirm two judgments and two final orders of the District Court of the United States for the District of Massachusetts. The motion is made under

Rule 6, paragraph 5, of this Court on the ground that it is manifest that the writs and appeals were taken for delay only, and, in the language of the brief for the United States, "to hinder the Government in the procurement of indictments against appellants for offenses against the laws of the United States, as well as to hamper the prosecutions against them." No question of the jurisdiction of this Court is raised.

The plaintiffs in error and appellants deny that it is either manifest or the fact that their cases have been brought here for delay or for any other improper purpose. On the contrary, it is, they believe, manifest that the judgments of contempt entered against them and the commitment thereon were without authority of law and in plain violation of their constitutional rights to be exempt from compulsory self-incrimination and from unreasonable searches and seizures and not to be deprived of their liberty without due process of law.

Both sets of cases are based upon the same facts, and present substantially the same questions of law. Unless otherwise stated, the references in this brief will be to the record in the writs of error Nos. 658 and 659.

No questions of fact have been at any stage of the cases in dispute. The material facts, as shown by the Bills of Exceptions (R. pp. 11, 21) and the Court's Findings of Fact (R. pp. 10, 21) are as follows: There was a Massachusetts corporation known as Wheeler and Shaw, Incorporated (R. p. 10). By a Massachusetts statute which took effect March 25, 1912 (Stat. 1912, Chap. 313), that corporation was dissolved, and its charter annulled (R. pp. 8, 10.—Government's Brief, p. 4). About one year earlier, namely, in "April, 1911, said corporation Wheeler & Shaw, Inc., ceased to do business, and shortly afterwards the legal title and possession of all the books and papers of said corporation then belonging to it, including all the books and copies of letters and telegrams described in (a certain

subpœna *duces tecum*) were lawfully transferred to the defendant (Warren B. Wheeler) and to one Stillman Shaw as tenants in common, and have ever since remained in the defendant (Wheeler) and said Shaw" (Findings of Fact, R. p. 11). Shaw was the president of the corporation and Wheeler treasurer, and neither ever resigned his office (ib. R. p. 11).

On April 12, 1912, the Federal grand jury in Boston was investigating the question whether Wheeler and Shaw individually "by means of said corporation or otherwise had violated the Act of Congress of March 4, 1909, being 35 Stat. (Part I) Chap. 321, Sect. 215," which makes using the mails for a scheme to defraud a crime punishable by fine or imprisonment, or both (Bill of Exceptions, R. p. 12).

On that day a subpœna *duces tecum*, with no *ad testificandum* clause, was issued, summoning said *corporation* (*not* Wheeler or Shaw individually) to appear before the grand jury forthwith and produce certain cash books, ledgers, journals, other books of account, copies of letters and telegrams, whether signed by the corporation or "by its president or its treasurer" in its behalf, all being therein described as "*of said Wheeler and Shaw, Incorporated*" (R. pp. 3–4). This subpœna was at once served on Wheeler as "treasurer" and Shaw as "president" of the corporation (R. pp. 4, 18). Later on the same day Wheeler and Shaw both appeared before the grand jury, did not bring any of the books, letters, etc., mentioned in the subpœna, asked to be sworn for the single purpose of explaining why they had not brought anything, were refused the oath, declined to answer any except merely formal questions, but left with the grand jury unsworn papers addressed to the grand jury, and containing a statement of reasons for the non-production of the books and papers (R. pp. 10, 4–6).

On the next day (April 13, 1912) the grand jury filed in the District Court against each man a paper entitled "Petition for Attachment for Contempt" (R. p. 2). This

petition did not charge that a contempt had already been committed by the failure of Wheeler and Shaw on April 12 to produce anything under the subpœna, but prayed that they "be ordered by this Honorable Court to produce said books, copies of letters and telegrams, and upon a failure or refusal . . . to comply with said order that he be adjudged in contempt" (R. p. 3).

On this petition a summons to show cause why the prayer of the petitioner should not be granted, returnable April 16, 1912, was issued and served upon each of them (R. p. 6). They appeared, filed motions to dismiss, which were denied (R. pp. 6–7), and then filed sworn answers (R. p. 8).

Both cases were heard by Judge Dodge on April 16 (R. pp. 9, 20), on the grand jury's petition, summons to show cause, answers, and certain agreed facts, which were afterwards (April 22) stated in the form of findings of fact by the Court (R. pp. 9, 10).

At the close of the hearing the learned judge refused all of the requests for rulings of the plaintiffs in error, ruled that the case was governed by *United States* v. *Wilson*, 221 U. S. 361, saved their exceptions, and ordered them "to produce the books and papers as set forth in the subpœna to witness at 2 P.M., April 17, 1912" (R. p. 9). They then, renewing their statement of reasons, informed the Court that they would not comply with said order (R. pp. 9, 20). On April 18, 1912, a final order was entered in each case adjudging them in contempt and committing them to the custody of the Marshal "until by producing" before the grand jury "the books and copies of letters and telegrams described in said subpœna he shall cease to obstruct and impede the corporation known as Wheeler & Shaw, Inc., and described in said subpœna, from complying with said subpœna *duces tecum*, or otherwise purge himself from this contempt" (R. pp. 10, 21).

On these judgments Wheeler and Shaw sued out writs of error. On April 22 they also filed petitions for writs of

habeas corpus against the Marshal (Nos. 660, 661, pp. 1, 14). From the final orders entered April 22, 1912, denying said petitions (ib. pp. 11, 17–18), they have also appealed to this Court (ib. pp. 11, 18).

A brief statement of the precise nature of the constitutional questions presented by these cases, and of the way in which they arise, seems to be required. Wheeler and Shaw made certain objections to the action of the grand jury and other objections to the action of the Court. As no attempt was made to punish them for anything done or not done at their appearance before the grand jury, it is only their objections to the action of the Court that are now presented for consideration. This eliminates the first and second grounds in their motions to dismiss, to the denial of which they took exception (R. pp. 6–7, 11, 19–20), as well as the question presented by the denial by the Court of the ruling requested at the hearing concerning the effect of the Grand Jury's refusal to administer the oath (R. pp. 11, 21); for, although the grand jury refused to permit them to state their excuses under oath, and thus denied them a hearing, they subsequently got at the hearing in court the benefit of all the facts which they desired to state, by the Government's admission of the truth of their sworn answer, as well as by the agreement on the facts incorporated in the Court's findings.

The remaining objections all concern either the order of the Court that on April 17 they produce the books and papers, the judgment of contempt which followed the disobedience of that order, and the order of commitment to the custody of the Marshal (R. pp. 12, 21). The grand jury's petition and the order made thereon were expressly based upon the subpœna, and were an attempt to enforce it. The defendants objected to the first-mentioned order on the ground that it violated their rights under the Fifth Amendment to the Constitution of the United States not to be compelled in any criminal case to be witnesses against

themselves, and also their rights under the Fourth Amendment to be secure against unreasonable searches and seizures (R. pp. 9, 11, 12, 20-21). They also claimed that the order was in violation of the Twelfth Article of the Bill of Rights of the Constitution of the Commonwealth of Massachusetts. This last-mentioned contention will not at the present stage of the case be insisted upon.

To the judgment of contempt and to the order of commitment the defendants made objections and took exceptions (R. pp. 12, 21), based partly on the special ground set up in the fifth paragraph of their motion to dismiss (R. pp. 7, 19-20), that, as the subpœna imposed no legal obligation upon the corporation to produce any books or papers, they could not lawfully be punished for obstructing the corporation in the production of the papers, and partly on the Fifth Amendment generally. This amounted in effect to the claim that their conviction and punishment for contempt were a violation of their right under the Fifth Amendment not to be deprived of their liberty without due process of law.

The various requests for rulings and exceptions to the rulings of the Court shown in the bills of exceptions (R. pp. 11, 21) were attempts to present one or the other of these fundamental questions or some aspect of them. And the assignments of error (R. pp. 13-14, 22-23) cover all of the questions. For reasons already stated, the fourth assignment of error is waived, and the eighth will not be argued at this stage of the cases.

The position taken by the Government in its brief appears to render unnecessary the discussion of two questions which might otherwise be involved in the cases. Those questions are: first, whether the contents of the books and papers called for by the subpœna would, as a matter of fact, tend to criminate Wheeler and Shaw; and, secondly, the question of the possible materiality of the Massachusetts statute of 1903, Chap. 437, Sec. 52 (referred to in

the motions to dismiss—R. pp. 7, 19–21), which continues for a limited period, and solely for the purposes of winding up, the existence of corporations whose charter has been annulled by special act of the Legislature. The first question is eliminated by the refusal of the Court, against the objections and exceptions of the plaintiffs in error, to find one way or the other whether the production of the books and papers would tend to criminate them, and by the ruling of the Court, also made against objection and exception,

> "that it was immaterial whether the production of said books and copies of letters and telegrams before said Grand Jury as required by said subpœna would or would not tend to criminate the defendant(s)" (R. pp. 12, 21).

Also the Government, by reason of the statements in the first paragraph on page 2 of its brief, appears to be conclusively committed to the proposition that the contents of the books and papers called for would, if disclosed, tend to criminate the plaintiffs in error and appellants.

The second question is eliminated by the following statement on page 4 of the Government's brief:—

> "It is further stated (Record, Nos. 658, 659, p. 8) *and may be assumed here* [italics ours] that the law of Massachusetts referred to in finding 2 was one dissolving the corporation of Wheeler & Shaw, Inc., and annulling its charter."

This statement and the other statements on that page of the brief render it clear that the Government intends to take the position that both the ownership of the books and papers, and also the existence of the corporation, are entirely immaterial under the decision in *Wilson* v. *United States*, 221 U. S. 361.

That the Government was well advised in thus impliedly conceding the immateriality of the statute of 1903,

Chap. 437, Sec. 52, is apparent from an inspection of that statute, as well as from the following authorities:—

Crease v. *Babcock*, 23 Pick. 334, 346.
Richards v. *Attleboro Nat. Bank*, 148 Mass. 187, 191.

See also *Nat'l Bank* v. *Ins. Co.*, 104 U. S. 54, 74–75.

The position of the plaintiffs in error and appellants upon the remaining questions of law is expressed in the following propositions, which they will now endeavor to establish:—

I.

The orders of commitment and the imprisonment thereunder have deprived the plaintiffs in error and appellants of their liberty without due process of law.

II.

If, as is agreed, the books and papers described in the subpœna were the private property of the plaintiffs in error and appellants, then the Court's order requiring their production before the grand jury, and the judgments of contempt based upon the disobedience of that order, violated the right of each plaintiff in error and appellant under the Fifth Amendment not to be compelled in any criminal case to be a witness against himself, and the right of each under the Fourth Amendment to be exempt from unreasonable searches and seizures.

ARGUMENT.

I.

The orders of commitment and the imprisonment thereunder have deprived the plaintiffs in error and appellants of their liberty without due process of law.

A. The subpœna imposed no legal obligation on the corporation to produce the books and papers.

(*a*) Even if the corporation had had any sort of existence at the time the subpœna was issued, it would have been under no legal obligation to produce the books and papers therein described.

(1) It was agreed that nearly a year before the date of the subpœna the corporation had been lawfully divested of "the legal title and possession" of all the books and papers described in the subpœna (R. p. 11); and—

(2) A natural person who had neither the title nor possession of books and papers could not by any known form of procedure be put under a legal obligation to produce them.

Ballman v. *U. S.*, 200 U. S. 186, 194.

(3) The case of a corporation in the same situation is even stronger,—certainly no weaker.

(*b*) But the corporation was not on April 12, 1912, the date of the subpœna, subject either to this particular subpœna or to any subpœna requiring the production of books or papers before a grand jury.

(1) It is an agreed fact that the corporation had nearly a year earlier "ceased to do business" any-

where (R. p. 11). This is in direct contradiction of the description of the corporation in the subpœna as "doing business at Boston in said District" (R. p. 3), and shows that the subpœna was based upon an erroneous assumption of fact.

(2) And not a single one of the reasons stated by this Court in *Wilson* v. *United States*, ubi supra, as the basis of an obligation on the part of a private corporation to produce its books and papers (if it had any) in judicial proceedings, existed when this subpœna was issued. For it is an agreed fact that nineteen days before the issuance of the subpœna "the corporation was lawfully dissolved and its charter annulled" (R. pp. 8, 10—Government's brief, p. 4). The corporation had thus ceased to be subject to the state's visitatorial powers; and it had no longer any special privileges, or franchises, or right to do business as a corporation. These are the considerations emphasized in,

Hale v. *Henkel*, 201 U. S. 43, 74–75.

(3) For reasons stated in the introduction to this brief, the Government's position is such as to render it entirely unnecessary to anticipate or discuss any suggestion of a possible limitation by the Massachusetts statute of 1903, Chap. 437, Sec. 52, of the effect of Stat. 1912, Chap. 313 (R. pp. 8, 11), in annihilating the corporation, at least so far as capacity to respond to a subpœna *duces tecum* is concerned.

(*c*) And, if the obstacles already referred to were not in the way, the objection urged by both Wheeler and Shaw on the corporation's behalf (as well as on their own), both in the second paragraph of their letter to the grand jury (R. p. 6) and at the hearing before the Court (R. pp. 9, 11–12, 19, 21), would still be in-

superable; namely, that the description of the books and papers in the subpœna is so broad and sweeping as to constitute an unreasonable search under the Fourth Amendment.

(1) The subpœna called for all the corporation's books covering the period October 1, 1909, to January 1, 1911; and copies of all letters written by it or on its behalf during October, November, and December, 1909, and the entire year 1910 (R. pp. 3–4).

(2) This description falls outside the line of reasonable particularity.

Hale v. *Henkel*, 201 U. S. 43, 76–77.

B. But, if the subpœna imposed no legal obligation upon the corporation to produce any books and papers, then it imposed no legal obligation upon Wheeler and Shaw individually to do so.

(*a*) The only obligation imposed upon Wheeler and Shaw by the serving upon them of a summons addressed to the corporation was an obligation in their official capacity depending wholly upon the existence of an obligation on the part of the corporation itself to produce the books and papers.

(1) The summons ran directly to the corporation, and not to Wheeler and Shaw.

(2) The service, which was in terms expressed to have been made upon Wheeler and Shaw in their official capacity (R. p. 4) as officers of the corporation, was simply a method of enforcing the assumed obligation of the corporation, and not any obligation of Wheeler and Shaw personally.

Commissioners v. *Sellew*, 99 U. S. 624, 627.

The duty imposed upon them by the service was secondary, not primary. They were the mere physical agency by which alone the corporation could act, if it could act at all. If the corporation was under no obligation to produce the books, the human agent was under no obligation. They were punished (R. p. 10) not for failure to perform any affirmative personal obligation, but for interfering with the corporation in the performance of its supposed obligation.

(3) That in such a case the obligation of the individual served is derivative and secondary, and not individual and primary, is the very essence of the reasoning in,

Wilson v. *U. S.*, ubi supra, pp. 376, 381–382, 385.

Dreier v. *U. S.*, 221 U. S. 394.

Consolidated Rendering Co. v. *Vermont*, 207 U. S. 541.

Baltimore & Ohio R.R. v. *Int. Com. Comm.*, 221 U. S. 612, 622–623.

In *Wilson* v. *United States*, Mr. Justice Hughes said p. 385,—

> "He could assert no personal right to retain the corporate books against any demand of government *which the corporation was bound to recognize*" (italics ours).

(*b*) The fact that the distinction between the nature of the two possible obligations which a subpœna *duces tecum* may impose upon the individual upon whom it is served is sometimes blurred by addressing the subpœna to the individual, when what is sought are documents held by him in an official capacity, serves only

to sharpen the distinction when the subpœna is addressed, as here, to the corporation itself.

(1) In *Wilson* v. *United States*, at p. 374, Mr. Justice Hughes said,—

> "Where the documents of a corporation are sought, the practice has been to subpœna the officer who has them in his custody. But there would seem to be no reason why the subpœna *duces tecum* should not be directed to the corporation itself."

Other instances of this modern practice are,

In re American Sugar Refining Co., 178 Fed. 109.

In re Bornn Hat Co., 184 Fed. 506, 508.

In the American Sugar Refining Company case, *ubi supra*, Lacombe, J., said (p. 111),—

> "No doubt this is a wholly novel practice," etc.

The reason for the adoption of this practice is illustrated in

In re American Tobacco Co., 146 Fed. 557,

where the subpœna was addressed to an individual describing him as secretary of a corporation, and it was held that he could not be punished for contempt for not producing the books when it appeared as a fact that they were in the custody of another officer of the corporation, and that the individual summoned could not obtain them without a breach of the peace. Lacombe, J., suggested that a new summons issue, directed to the corporation itself, and that it be served upon the particular officer who had the books.

(2) If, as here, a man should happen to own and

possess corporation books in his individual capacity, and a subpœna should issue directed to him, requiring in terms the production of the books, and not describing him as an official of the corporation, then doubtless the objection that there was no obligation on the part of the corporation to produce the books would take the form of one argument in support of his claim of constitutional privilege against compulsory self-incrimination, and not, as in this part of our brief, the form of an objection independent of that particular constitutional right. But, where the summons is addressed to the corporation itself, then, independently of that constitutional right of the individual custodian, there can be no obligation on him to produce them unless it is first shown that the subpœna imposes an obligation upon the corporation itself to produce them.

(3) The one advantage which the Government sought to secure by choosing a summons addressed to the corporation itself rather than one addressed to the individual custodian illustrates the distinction. For a corporation is not protected by the Fifth Amendment, and a natural person is.

Hale v. *Henkel*, 201 U. S. 43.
The Bornn Hat Co. v. *U. S.*, 223 U. S. 713, affirming 184 Fed. 506.

The Government can hardly expect to obtain all the advantages of both kinds of summons, and none of the disadvantages of either.

C. If it is suggested that no objection was made on the corporation's behalf to the production of the books and papers, the suggestion is either unsound or unwarranted, or both.

(*a*) If, as we are entitled to assume, the corporation did not exist, then it is for that reason that no objec-

tion was made on its behalf, and not because the corporation, expressing its view through some officers or agents other than Wheeler and Shaw (if there were any other officers or agents, which does not appear), was willing to produce the books and papers; and—

(*b*) If the corporation is assumed to have been moribund, but still with sufficient life to enter an objection against a subpœna requiring it to produce books and papers, then the second paragraphs of the letters of Wheeler and Shaw to the grand jury (R. pp. 6, 19) were equivalent to an objection on its behalf. The language is:—

> "Even were the facts not as stated above, I am advised that the language of said subpœna quoted above is so broad, sweeping, and lacking in particularity as to constitute a violation of the rights of *any* party to whom a subpœna is addressed to be exempt from unreasonable searches and seizures under the Fourth Amendment to the United States Constitution."

Besides, if the corporation existed the statements of Wheeler and Shaw to the grand jury, repeated at the hearing and found to be true, that they possessed in their official capacity none of the books and papers described in the subpœna, must be deemed to be equivalent to an objection on the corporation's behalf, Wheeler and Shaw never having resigned their respective offices of treasurer and president (Finding of Fact No. 4, R. pp. 11, 21).

D. If the foregoing considerations are sound, then the orders of commitment and the punishment by imprisonment of the plaintiffs in error and appellants deprived them of their liberty without due process of law.

(*a*) They were adjudged in contempt and committed for "obstructing" and "impeding" "the corporation known as the Wheeler & Shaw, Inc., and de-

scribed in said subpœna, from complying with the said subpœna *duces tecum*" (R. pp. 10, 21).

(*b*) But it needs no argument to show that they could not be guilty of contempt or liable to punishment therefor for preventing a non-existent corporation from doing something which, even had it existed, it would have been under not the slightest legal obligation to do. On the agreed facts the subpœna was void, and the District Court had no jurisdiction to enforce it. The motions to dismiss should have been granted.*

II.

If, as is agreed, the books and papers described in the subpœna were the private property of the plaintiffs in error and appellants, then the Court's order requiring their production before the grand jury, and the judgments of contempt based upon the disobedience of that order, violated the right of each plaintiff in error and appellant under the Fifth Amendment not to be compelled in any criminal case to be a witness against himself, and the right of each under the Fourth Amendment to be exempt from unreasonable searches and seizures.

A. Assuming that the contents of documents would, in fact, tend to criminate an individual, his protection under the Fourth and Fifth Amendments against being compelled to produce them depends wholly upon the capacity in which he holds them, not at all upon their origin or upon the character in other respects of the information contained in them.

(*a*) This proposition is supported by authority, and is not, as the Government's brief seems to imply, a novelty.

Boyd v. *United States*, 116 U. S. 616.

* If material it may be pointed out that the word "petition" in the fifth line of the bill of exceptions as printed (R. p. 11) is an obvious mistake. The word intended was "motion."

The statute of June 22, 1874, under examination in that case, did not contain the word "private." It referred only to "any business book, invoice, or paper *belonging to or under the control of* the defendant or claimant." It was *this Court* that defined such documents as "a man's . . . private papers" within the meaning of the Fourth and Fifth Amendments (p. 630). And this definition was founded on Lord Camden's opinion in

> *Entick* v. *Carrington et als.*, 19 How. State Trials, 1029,

where he said,—

"Papers are the owner's goods and chattels; they are his dearest property."

Ownership and possession were Lord Camden's test of "private" papers.

Can it be seriously suggested that this Court meant to intimate that breaking into a man's house would not be an unreasonable search if the papers sought, though known to be his property, formerly belonged to a corporation? The Boyd case has perhaps been limited in some respects by subsequent decisions, but not on this point.

Wilson v. *United States*, far from rejecting this view, confirms it. On page 376 of the opinion it is said,—

> "But there is no unreasonable search and seizure when a writ, suitably specific and properly limited in its scope, calls for the production of documents which, *as against* their *lawful owner* to whom the writ is directed, the party procuring its issuance is entitled to have produced" (italics ours).

And on page 377:—

> "The copies of letters written by the president of the corporation in the course of its transactions were *as much a part of its documentary property* (italics ours) . . . as its ledgers and minute books."

This was said in discussing the "character" of the books called for. And that is obviously the sense in which the word "character" was used in the subsequent passages of the opinion quoted in the Government's brief.

It is said on page 378,—

> . . . "if they have been held pursuant to the authority of the corporation, that authority is subject to termination."

But no corporation can terminate the authority of a man to hold his own property; certainly not merely because it was once the corporation's property.

Again on page 380 the learned judge says,—

> "The question still remains with respect to the nature of the documents *and the capacity in which they are held*" (italics ours).

And again (p. 384):—

> "The appellant held the corporate books subject to the corporate duty."

And page 386:—

> "Nothing more is demanded than that the appellant should perform the obligations pertaining to his custody, and should produce the books which he holds *in his official capacity* in accordance with the requirements of the subpœna" (italics ours).

This was said in discussing the appellant's claim under the Fifth Amendment. But where the ap-

pellant holds the books not in any official capacity, but in a purely private and personal capacity, something more *is* demanded, and that something more is that he be deprived of his constitutional protection against self-incrimination.

The truth is that the novel view of what are "private" papers is the Government's view, not ours. That the test of "private papers" laid down in *Wilson* v. *United States* and *Boyd* v. *United States* is what we aver was assumed as a matter of course in

> *Hillman* v. *U. S.*, 192 Fed. 264, 270 (C. C. A. 9th Cir.),

in which a petition for *certiorari* was denied by this Court (No. 1020, April 1, 1912); and has never, so far as we know, been questioned in any opinion of this Court or any other court.

And, notwithstanding the Government's attempt (Brief, p. 6) to distinguish

> *In the Matter of Harris*, 221 U. S. 274,

the necessary implications of the opinion in that case are conclusive in our favor.

(*b*) The consequences of adopting as the test of the scope of the individual's constitutional protection against self-incrimination "the nature of the contents of the books and records themselves" (Government's brief, p. 4) are such as to require the rejection of that test, even if the question were *res nova*.

(1) In *Boyd* v. *U. S.*, ubi supra, it is said (p. 630),—

> "In this regard the Fourth and Fifth Amendments run almost into each other."

The extraordinary consequences of applying the Government's test to determine what are unreason-

able searches and seizures under the Fourth Amendment have already been suggested.

(2) Suppose a junk dealer on trial for murder sets up an alibi. In one of the books of a defunct corporation which he has bought appears an entry made while the corporation owned the book, showing a former sale of junk to him and thus proving his presence on a certain day in the town where the crime was committed,—a fact fatal to his alibi. On the Government's theory how could he be protected by the Fifth Amendment (or by the analogue of that amendment in any state constitution) from the compulsory production of that book by subpœna *duces tecum* at his own trial? Will it be said that he would be protected by the Fifth Amendment if the summons were addressed to him in his individual capacity, and by the fact that he was not an officer or agent if it were addressed to the corporation and served on him? That would be to abandon the Government's test, which is "the nature of the contents of the books and records themselves" (Brief, p. 4), the fact that "the books are *and must ever remain the record books of the corporation*" (ib. p. 6).

For on the Government's test any man who has in his possession books containing corporation entries is the corporation's agent to produce them on a subpœna addressed to it. And if "the nature of the contents of the books" is the test, what difference can it make whether the subpœna is addressed directly to the individual who has them or to the corporation and served on him? The capricious frittering away of a vital constitutional right by the Government's test is manifest.

(3) And, again, for what reason other than caprice can the Government's test be restricted to books

showing the transactions of a corporation? Suppose my neighbor's diary shows my crime." If the nature of the contents of the book is the test, then, if I buy his diary, how does the Fifth Amendment protect me from being compelled by subpœna *duces tecum* to produce it in a criminal case against myself?

B. Finally, the lack of reasonable particularity in the description of the books and papers in the subpœna is as valid an objection to the subpœna under the Fourth Amendment when urged by Wheeler and Shaw personally as when urged by the corporation.

(*a*) That the subpœna was unreasonably sweeping, and that this defect was seasonably urged by Wheeler and Shaw on their own behalf, has already been pointed out (*ante*, p. 11).

(*b*) If for this reason the subpœna was void as against the corporation, it could not be valid as against Wheeler or Shaw.

C. The statement on page 6 of the Government's brief, "Any other reasoning would entirely destroy the value of the decision in the Wilson case," seems to require no reply except the obvious one, that the purpose of decisions is not to assist the Government, but to declare the law.

It is respectfully submitted that the Government's motion should be denied.

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